

DOZE v. SMITH.

(Circuit Court of Appeals, Eighth Circuit. August 19, 1895.)

No. 577.

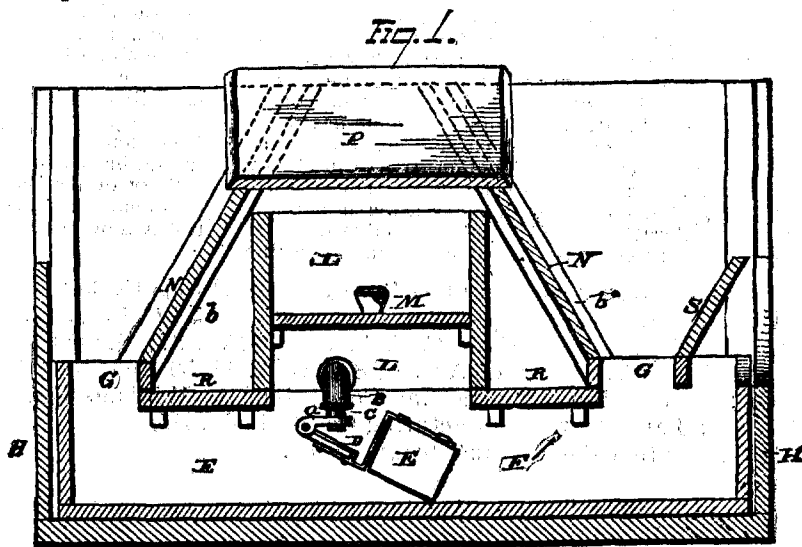
PATENTS—VALIDITY AND INFRINGEMENT—EQUIVALENTS—WATERING TROUGHS.

The combination described in the fourth claim of the Campbell patent, No. 221,031, for an improvement in troughs for watering stock, if patentable at all, does not disclose invention of such a character as will entitle it to the benefit of the doctrine of equivalents; and it must be confined to the precise form described. 66 Fed. 327, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

This was a bill in equity by John E. Doze against Alpheus Smith for alleged infringement of a patent relating to troughs for watering stock. The circuit court dismissed the bill. 66 Fed. 327. Complainant appealed.

The subjoined drawing, to which reference is made in the opinion, is a longitudinal sectional view of an improved device for watering stock, for which letters patent of the United States, No. 221,031, were issued to John S. Campbell on October 28, 1879, under an application filed September 3, 1879. The case is sufficiently stated in the opinion.



A. B. Cummins (Carroll Wright, on the brief), for appellent.

C. W. Steele (Lewis Miles, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This was a suit to restrain the infringement of United States letters patent No. 221,031, that were

issued to John S. Campbell on October 28, 1879, and were subsequently assigned to J. E. Doze, the appellant, who was the complainant in the circuit court. The patent covers an alleged improvement in a watering trough for watering stock. The invention may be sufficiently described as follows: The inlet pipe, by means of which water is introduced into an ordinary watering trough, is provided with a float valve, marked "E" in the foregoing drawing, which operates in the customary way to open or close the inlet pipe to which it is attached when the water in the trough falls below or rises above a certain level. The valve mechanism, which is usually placed at about the center of the trough, is protected by an air chamber, marked "L" in the drawing, which consists of a square box seated upon the trough. The lower end of the box is left open. A removable cover, marked "M," is fitted within the box or air chamber so as to permit the box to be filled for a considerable distance from the top downward with sawdust or other suitable packing material, to prevent freezing. On both sides of the box last described, the top of the trough is covered closely for some distance with boards, marked "R, R," which are fitted in the top of the trough. These boards are termed by the inventor "horizontal partitions," and the function they are said to perform is to prevent air from entering beneath the bottom of the box into the air chamber in which the float valve is located. At both ends of the trough for a short distance the trough is left uncovered, so that stock can have access to the water. These uncovered portions of the trough, marked "G, G," in the drawing, are provided with a rim, and are termed "drinking caps." From the drinking caps to the top of the box which incloses the valve mechanism, boards, marked "N, N," are set on an incline, so as to permit the intervening space between said inclines and the so-termed "horizontal partitions" to be closely packed with sawdust or some other suitable packing substance. It seems to have been contemplated by the inventor that the drinking trough in question should be surrounded on all sides by a curb, and that the space between the curb and the sides of the trough should be packed with some suitable substance so as to guard against freezing. It will also be observed that besides the removable cover, M, the air chamber, or box which is seated on the trough, is provided with an exterior cover or cap, marked "P" in the drawing.

The device which is supposed to be an infringement of the claims of the above-described patent is a watering trough that was constructed by the defendant for use on his farm in the state of Iowa. The defendant's watering trough differs from the improved watering trough described in the Campbell patent chiefly in the following respects: The two sides of the box shown in the foregoing drawing, which forms the air chamber in which the valve mechanism is located, do not rest upon the upper edge of the trough, like the box described in the Campbell patent, but extend downward into the trough for some inches below the level of the water. These projecting sides of the box are of the same width as the trough, and are closely fitted into the trough, the result being that they form a "water seal," which effectually excludes the outer air from the valve

chamber. The defendant's watering trough is covered for some distance on both sides of the air chamber, but suitable drinking spaces are left at each end. It is so constructed that the entire trough, except the drinking spaces, may be covered with earth to prevent the water in the valve chamber from freezing.

It is contended in behalf of the appellant that the watering trough last described, which was constructed by the defendant, is an infringement of the second and fourth claims of the Campbell patent. The record shows, however, that on the hearing of the case in the circuit court the complainant did not contend that the second claim of the patent was infringed, but waived all the claims of his patent except the fourth. In view of that fact, he must be limited to the same claim in this court. The question for consideration, therefore, is whether the defendant's device is an infringement of the fourth claim of the Campbell patent. That claim is expressed in the following language:

"Fourth. In a device for watering stock, the combination, with a trough having a drinking cap fitted on its top, of valve feed mechanism and an open-bottom chamber located over the latter, together with a horizontal partition fitted in the top of the trough between said drinking cap and chamber, whereby air is prevented from entering the bottom of the latter, substantially as set forth."

It is noticeable at a glance that the device employed by the defendant to exclude the outer air from the air chamber in which the valve mechanism is located is quite different from that described in the Campbell patent. The defendant excludes the air by extending the sides of the box forming the air chamber below the level of the water in the trough, thus forming a water seal, whereas the patentee excludes the air by covering the top of the trough between the air chamber and the drinking caps with boards fitted closely in the top of the trough. It is doubtful, we think, whether the patentee ever contemplated forming a water seal for the purpose of excluding the outer air from the valve chamber. He says in his specification, and this is all that is said on that point: "Horizontal partitions, R, are fitted in the top of the trough, and extend from the inner end of each drinking cap to the chamber L. Said horizontal partitions, R, prevent air from entering beneath the bottom of the chamber L at its end between said chamber and the surface of the water in the trough." But whether the float valve was intended to be so adjusted as to maintain the water in the trough and in the water caps at a higher level than the bottom of these so-termed "horizontal partitions," R, R, so as to form a water seal for the valve chamber, is not stated. In view of the fact that the specification is silent on that point, we might very well conclude that the horizontal partitions were simply designed to cover the trough, and to support the exterior packing, and that the inventor had no well-defined purpose of making the horizontal covering of the trough serve as a water seal to exclude the outer air from the valve chamber. The appellant contends, however, that the so-termed "horizontal partitions" of the patented device and the projecting sides of the box forming the air chamber of the defendant's device perform the same function, in

that they both serve to exclude air from the valve chamber. It is accordingly insisted by the appellant that the projecting sides of the air chamber in the defendant's device are a mechanical equivalent for the horizontal partitions described in the Campbell patent, and that the fourth claim of the patent is therefore infringed. We should feel more disposed to sustain this contention if we were better satisfied that the fourth claim of the Campbell patent covers a combination which possesses patentable novelty. It is apparent from the description of the device heretofore given that all of the four elements mentioned in the fourth claim, to wit, the trough having a drinking cap, the valve feed mechanism, the open-bottom air chamber, and the horizontal partitions fitted in the top of the trough, are each individually old. The flushing boxes now generally in use in water-closets contain two of the most important elements of the combination described in the Campbell patent; namely, a box or trough to hold water, and a float valve to control the flow of water into the box from the inlet pipe. It certainly did not require the exercise of much inventive skill to add the other elements of the combination; namely, the open-bottom box to cover the valve mechanism and prevent freezing, and the horizontal partitions or covers set in the top of the trough between the air chamber and the drinking spaces at each end of the trough. While it is not necessary at the present time to decide that the conception of the combination covered by the fourth claim of the patent merely involved an exercise of ordinary mechanical skill, and that the device is for that reason destitute of patentable novelty, yet it is manifest, we think, that in a case of this kind the doctrine of mechanical equivalents cannot be invoked for the purpose of giving the claim greater scope. The patentee should be limited, we think, to the precise form of device which he has described and claimed. Entertaining these views, we agree with the circuit court in holding that, as the defendant does not make use of the horizontal partitions which form one of the integral elements of the patented combination, he is not guilty of an infringement. The decree of the circuit court is accordingly affirmed.

PILE DRIVER E. O. A.

MUELLERWEISSE et al. v. PILE DRIVER E. O. A.

(District Court, E. D. Michigan. November 7, 1894.)

1. ADMIRALTY JURISDICTION—STATE STATUTES.

A federal court sitting in admiralty cannot enforce a lien given by a state statute upon a floating structure, unless the same is of such a character as to be a subject of admiralty jurisdiction.

2. SAME—SUBJECTS OF ADMIRALTY JURISDICTION—FLOATING PILE DRIVER.

A pile driver consisting of a floating platform, carrying a derrick, engine, and pile-driving apparatus, and also furnished with a wheel by which it may propel itself about the bay or harbor, from one place of work to another, and which in its present condition is not fitted for purposes of transportation, is not a subject of admiralty jurisdiction; and contracts to furnish it with supplies are not maritime contracts enforceable in the admiralty.

In Admiralty.

This was a libel against the pile driver E. O. A. to enforce an alleged lien for supplies.

Moores & Goff, for libelants.

J. W. Finney, for claimants.

SWAN, District Judge. The libel in this cause was filed to recover for supplies furnished at Alpena, Mich., to the pile driver E. O. A., during each month of 1890, beginning with March, and during the months of January, February, and March, 1891. The amount claimed is \$431.48, with interest. The libel alleges "that, at the several times therein mentioned, said vessel was a vessel of five tons burden and upward, and used for commerce and navigation, and thence hitherto had been and is as to said libelants a vessel owned wholly by persons residing in the state of Michigan"; that the supplies were furnished at Alpena at the request of the master of the E. O. A., and on his representation that "the said vessel stood in need of the supplies, * * * in order to render her seaworthy and competent to proceed on her intended voyages and trips"; and "that, by the laws of the state of Michigan, libelants have a lien on said vessel for said materials and supplies." The answer denies the jurisdiction of the court, and avers that the pile driver is a vessel of five tons burden and upward, as alleged in said libel, but denies that said pile driver is competent to perform any voyages or trips of a nature to subject the craft to the admiralty and maritime jurisdiction of this court, and denies that the pile driver had any master during the times mentioned in the libel. It further pleads that the pile driver is a platform or a float upon which is erected the ordinary derrick and appliances for the use of a pile-driving hammer, and a small stationary engine to run said hammer; that said float and appliances are not used in commerce and navigation, but are used simply for the purpose of driving piles about the docks in the harbor of Alpena and in Alpena river; and that the person in charge of the pile driver, with his family, has lived thereon during the time in said libel mentioned; and, upon information and belief, charges that all the supplies were furnished for the use of the person in charge of said pile driver and his family, upon his individual credit, and largely during the winter months, while navigation was closed. The further defenses set up in the answer are not necessary to be considered in the view taken of the case.

The character and uses of the E. O. A. are substantially as set forth in the answer. She was also equipped with a rudder and steering wheel in addition to the appliances used for the business of pile driving and dock building. It is also established that the person in charge of and who operated the hammer lived on board the E. O. A. with his family; and the schedule attached to the libel shows that the supplies for which this lien is claimed consist wholly of provisions and articles necessary to housekeeping. This scow or floating platform upon which the pile driver was erected was about 60 feet long, 20 feet beam, and 2½ feet deep, and, so far as its carrying capacity was con-

cerned, was therefore of upward of five tons burden. The E. O. A. was not enrolled or licensed. The engine and boiler, the main use of which was to operate the pile hammer, were never inspected, nor was the man in charge of the craft, whose duty it was to operate the hammer, ever licensed as a master, nor did he profess to be a seaman. The only crew ever carried by this platform were Knight, who claimed to be the owner and operator of the pile driver; his wife, who did the cooking; his son, a young man who had not attained his majority; and, when necessary, another workman, who assisted in the operation of the hammer. In the performance of the work for which this structure was intended and for which it was engaged during all the times mentioned in the libel, the craft was propelled by a stern wheel connected by a beveled gear with a portable engine, the main use of which was to operate the hammer; and, to save expense of towing, the engine was used, when thus connected with the stern wheel, to move the platform from point to point in Alpena bay or Alpena river, wherever docks were to be built or piles driven. It also appears that four or five years before the supplies, or any part of them, were furnished, the scow or platform on which the pile driver was erected had been used on two occasions to transport gravel and cedar ties. For that purpose the pile-driver apparatus was removed from the platform and put ashore; and that in the winter, when ice prevented the movement of the scow, the apparatus, when required for use, was taken off the scow, and operated upon the ice or on the shore, as occasion required.

Upon the foregoing state of facts, the only inquiry is whether or not a court of admiralty has jurisdiction to enforce the contract pleaded in the libel. It is true that the libelants claim to have a lien for the supplies furnished under and by virtue of the water-craft law of the state of Michigan (2 How. Ann. St. c. 285); but, inasmuch as the true limits of admiralty jurisdiction must determine libelants' right of recovery, and as no state law or act of congress can make that jurisdiction broader or narrower than the judicial power may determine its limits to be (*The Lottawana*, 21 Wall. 576), it follows that, unless the structure proceeded against is the subject of admiralty jurisdiction, the fact, if it be a fact, that the state law confers a lien upon it for supplies and materials, is immaterial.

While it is probably true that this pile driver might be capable of a tort upon navigable waters, in this cause the jurisdiction is dependent upon the nature of the contract. "In actions of contract the agreement sued upon must be maritime in its character. It must pertain in some way to the navigation of a vessel, having carrying capacity, and employed as an instrument of travel, trade, or commerce, although its form and means of propulsion are immaterial." *A Raft of Cypress Logs*, 1 Flip. 543, Fed. Cas. No. 11,527; *The General Cass*, 1 Brown, Adm. 334, Fed. Cas. No. 5,307. The fact that a structure floated on the water does not make it a ship or a vessel. *Cope v. Dry-Dock Co.*, 119 U. S. 627, 7 Sup. Ct. 336; *The Pulaski*, 33 Fed. 383; *The Hendrick Hudson*, 3 Ben. 419, Fed. Cas. No. 6,355.

In the last case it is said:

"The fact that the structure has the shape of a vessel, or has been once used as a vessel, or could by proper appliances be again used as such, cannot affect the question. The test is the actual status of the structure as being fairly engaged in commerce or navigation."

It is true that the E. O. A. had carrying capacity, and was of more than 20 tons burden; but the fact remains that her only use and employment during all the time mentioned in the libel was not in commerce and navigation. The two exceptional occasions, on one of which she carried a quantity of sand, and on another a few cedar poles, by removing for that purpose the apparatus for pile driving, were her only ventures in transportation. Since then her sole employment has been the driving of piles and building of docks. The transportation of the hammer, and, for its operation, of the portable engine, and their support and floatage while in use, were the sole functions of this scow or platform. When ice prevented the use of the scow, it also took its place as the base of operations of the pile driver, when the scow's only use was to furnish lodging and dining facilities for the operator of the hammer and his family. The engine propelled the structure to the place of its labors, and was then used to operate the pile driver.

Much stress is laid upon the relation of wharves and docks to commerce as justifying the claim made by the libelants, and in support of the contention that the use of the pile driver was within the definition of commerce and navigation as generally understood. But this position is untenable. While docks and wharves are indispensable to the conduct of commerce, yet other industries have a still closer relation to commerce, and yet are clearly outside the pale of admiralty cognizance. The same argument that would sustain the jurisdiction of a claim against the machinery for building a dock because a dock is an inseparable adjunct of commerce would compel the recognition of the claim of the lumberman or the foundryman who furnishes the materials for the construction of a vessel, of the shipwright who builds her, and of the machinist and boiler makers who supply her engines and boilers. But these are claims enforceable only in the common-law courts, or under special statutes of the several states. *Edwards v. Elliott*, 21 Wall. 553; *The Jefferson*, 20 How. 393; *Roach v. Chapman*, 22 How. 129. I have not overlooked the case of *The Hezekiah Baldwin*, 8 Ben. 556, Fed. Cas. No. 6,449, in which the vessel proceeded against was employed in the transfer, by the elevator which she carried, of cargoes from one vessel to another. The jurisdiction is maintained on the same principle that controls in the recognition of the services of the stevedore and the use of a lighter as an aid to commerce and navigation. In *The Alabama*, 19 Fed. 544, affirmed on appeal in 22 Fed. 449, the scows used for the carriage of the mud excavated by the dredge in connection with which they were employed were engaged in an obviously maritime service, and were none the less vehicles of commerce because the article they transported was not a merchantable commodity, but simply material of no value.

Their service was purely maritime transportation. The case of *The Pioneer*, 30 Fed. 206, which sustains a lien upon a dredge because it was capable of use in navigation without its machinery, although its only use was to transport the shovel and machinery with which it was equipped, is irreconcilable with the cases of *The Hendrick Hudson*, 3 Ben. 419, Fed. Cas. No. 6,355; *The Pulaski*, 33 Fed. 383; *Ruddiman v. A Scow Platform*, 38 Fed. 158; *The Big Jim*, 61 Fed. 503.

For the reasons stated, the *E. O. A.* is not the subject of admiralty jurisdiction, and the contract for the supplies in the libel claimed to have been furnished is not a matter of admiralty cognizance. The libel must therefore be dismissed; and as the want of jurisdiction does not appear upon its face, but was raised by the answer and shown by the proofs, the claimants are entitled to their costs. *Lowe v. The Benjamin*, 1 Wall. Jr. 187, Fed. Cas. No. 8,565.

THE NEBRASKA.

Appeal of MILWAUKEE DRY DOCK CO.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1895.)

No. 191.

1. MARITIME LIENS—WAIVER—GIVING SECURITY.

A maritime lien is waived by accepting notes or other securities extending the time of payment beyond the time within which, by the general maritime law or by statute, the lienor is allowed to enforce the lien.

2. SAME—STALE LIENS—VESSELS ON THE GREAT LAKES.

In respect to vessels navigating the Great Lakes, the general maritime rule limiting the time within which a lien must be enforced to the particular voyage has been modified so as to fix the limitation by the seasons of navigation.

3. SAME—WAIVER—TAKING MORTGAGE AND NOTES.

Where one having a maritime lien upon a vessel navigating the Great Lakes libeled her, and had her taken in custody, but afterwards voluntarily released her and dismissed the libel, by agreement with her owner and her mortgagees, accepting a mortgage and notes extending the time of payment 18 months, which would carry it beyond the close of the season of navigation following that in which she was at the time engaged, *held*, that this was a waiver of the maritime lien as to subsequent innocent lienors, notwithstanding that the notes contained an express provision that the lien should not be waived, which provision, however, was not incorporated in the mortgage.

Appeal from the District Court of the United States for the Northern District of Illinois.

This was a libel by Frank Hoffman against the steam propeller *Nebraska* to enforce a lien for supplies. Various parties intervened, asserting claims against the vessel, among them the Milwaukee Dry Dock Company. This company filed exceptions to the order of distribution recommended by the master's report, and the exceptions being overruled, and a decree being entered, postponing its claim to

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